Present: Ennis J. and De Sampayo A.J. 1914.

CHARISA *v.* COUDERT.

136—D. C. Negombo, 9,498.

Gift by one spouse to another—Parties married in community before 1876—Ordinance No. 15 of 1876, s. 13—Prescription—"Acknowledgment of a right existing in another"—Acknowledgment must be of the right of a party to the action or of his predecessor in title.

A spouse married before the coming into operation of Ordinance No. 15 of 1876 may by virtue of section 13 of the Ordinance, notwithstanding the existence of any community of goods between the spouses, make a gift of property in favour of the other spouse. The property so gifted becomes separate property of the donee, subject only to the debts and engagements of the donor.

DE SAMPAYO A.J.—Under the Roman-Dutch law a gift by one spouse to the other is not absolutely void.

THE facts appear from the judgment.

A. St. V. Jayewardene, for appellant.

Bawa, K.C. (with him *Samarawickreme*), for respondent.

Cur. adv. vult.

July 17, 1914. ENNIS J.—

The land sought to be partitioned in this action originally belonged to Amanduwa and Subi, who were married in community of property before the passing of the Ordinance No. 15 of 1876. In 1888 Amanduwa executed a deed of gift of the land in favour of Subi. In 1899 Subi gifted the northern half to Gavaria. Subi had three children, Bellinda, Gunaya, and Lapi. Bellinda married one Sima Veda, and died in 1900, leaving two children, the plaintiffs, who are minors. In 1906 Gavaria purchased from Sima Veda, Gunaya, and Lapi the southern half of the land. Gavaria's interest in the land passed by a series of deeds to the defendant. The plaintiffs appear by Subi, their next friend.

The first question to be decided is whether the gift of 1888 by Amanduwa passed the property to Subi. This turns on the construction to be placed on section 13 of Ordinance No. 15 of 1876. Section 5 of that Ordinance provides that the matrimonial rights of a husband and wife married before the proclamation of the Ordinance shall, except as in the Ordinance otherwise expressly provided, be governed by such law as would have been applicable thereto if the Ordinance had not been passed. Is section 13 an express provision of the Ordinance which would enable the husband

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to make a good and valid gift to his wife so as to vest property in her? In my opinion it is. Section 13 enacts that it shall be lawful for a husband or wife married before the proclamation of the Ordinance, notwithstanding the relation of marriage and notwithstanding the existence of any community of goods between them, to make, during the marriage, a gift of property in favour of the other, and the section further provides that property so gifted shall be subject to the debts and engagements of each spouse as if the gift had not been made. The words of the section can be read, it seems to me, only as expressly providing that the gift may be so made as to vest the property in the wife, notwithstanding the existence of community of property between them. To read it in any other way would make the proviso unnecessary, and would give the section the effect only of permitting the husband and wife "to amuse themselves by writing deeds of gift," as my brother De Sampayo has expressed it. It is urged that an examination of sections 9 and 10 shows that where property vests in the wife for her separate use express provision is made giving her a power of disposition. It seems to me that the absence of a provision in section 13, giving a power of disposal, has the effect only of leaving that question as it was before the passing of the Ordinance, viz., that the wife could dispose of the property during her husband's lifetime only with the consent of her husband, and that it does not affect the vesting of the property in the wife. This being so, I am of opinion that the land to be partitioned in this case passed to Subi.

There is not much oral evidence of possession. Gavaria has not been called as a witness, and Subi does not claim the land for herself. Her position seems to be that, after the death of her husband, her children were allowed to take the land as if by inheritance, and she does not herself prefer any claim either to the 1-12th claimed for the plaintiffs or to the remaining 5-12ths of the half. The contest is between the minor children of Bellinda and the defendant. In this connection the deed P 5, under which Gavaria bought the whole of the southern portion in 1906, seems to be decisive as against the defendant, that the children of Subi were in possession in 1906. Gavaria was a stepbrother of Bellinda, and must have been fully aware when he bought from Sima Veda that he was Bellinda's husband, and as such entitled only to half of Bellinda's share. His purchase, therefore, in 1906 was an acknowledgment of the rights of Bellinda, Gunaya, and Lapi, the children of Subi, and the deed recites that the vendors were in possession of the whole of the southern half. The District Judge says he has no doubt that Gavaria possessed the whole land since 1899, but Gavaria acknowledges the possession of the children of Subi by the deed of 1906, and whether this debars defendant from using evidence to contradict the document to establish prescription as against Subi is a question upon which Subi should be heard if she

so wishes. There is no clear proof that the children of Subi were in possession for two years prior to 1906, and the plaintiffs have accordingly failed to prove a title by prescription. In the circumstances I agree with the order proposed by my brother De Sampayo.

DE SAMPAYO A.J.—

In this case the plaintiffs claim 1-12th share of a land Thottilagahalanda, and allowing to the defendant the rest of the land they seek a partition thereof between themselves and the defendant. One Amanduwa, who was married in community of property to Subi, was at one time the owner of the land, and he by deed dated March 17, 1888, gifted it to his wife Subi. By deed dated November 3, 1899, Subi sold the northern half of the land to Gavaria. Amanduwa died leaving three children, named Bellinda, Gunaya, and Lapi. Bellinda was married to one Sima Veda, and died in 1900, and the plaintiffs are her children. By deed dated May 10, 1906, Sima Veda, Gunaya, and Lapi, describing their title as by inheritance, sold the southern half of the land to Gavaria. It would seem that both before and after the dates of the above deeds Gavaria was in possession of the entire land, and mortgaged it to Mr. T. K. Carron, who purchased it in execution against Gavaria and subsequently sold it to the defendant, who thus claims the whole land against the plaintiffs.

The main contention on behalf of the plaintiffs is that Amanduwa's deed of gift in favour of his wife Subi had no practical effect; that, though title passed to Subi by virtue of the deed, the property came back to the community at the same moment, inasmuch as everything of whatever kind belonging to the husband or wife falls into the community; that, therefore, on the death of Amanduwa a half share of the land came by inheritance to his children, and that as Bellinda's husband Sima Veda could legally dispose of only a half of Bellinda's 1-6th share, the plaintiffs as heirs of Bellinda are entitled to the 1-12th share which they claim. This contention, if it prevailed, would set at nought the provisions of section 13 of the Ordinance No. 15 of 1876, which abolishes the Roman-Dutch law prohibiting donations between spouses married in community, and sanctions such donations, subject to the proviso that the property so gifted shall be subject to the debts and engagements of each spouse in the same manner as if such gift had not been made. This section would be wholly meaningless, unless it be construed in intention and scope to provide that the property shall be the separate property of the donee, subject only to the debts and engagements of the donor. It is argued that this is not the effect of the section, inasmuch as, while other sections of the Ordinance expressly provide that certain species of property shall constitute the separate property of the wife, this section contains no similar provision. The section might certainly have been more plainly worded, but

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I think the form of words is explainable by the circumstance that, while those other species of property are to be independent of the debts and engagements of the husband, any property donated by either spouse is intended and declared to be subject to the debts and engagements of both spouses as if no gifts had been made. It cannot be supposed that by enacting section 18 the Legislature meant nothing, and the only way to give effect to it is to hold that under the Ordinance, when a gift is made between spouses married in community, the property gifted becomes the separate property of the donee. It is, however, not quite necessary to make reference to section 18 of the Ordinance in order to support Subi's title to the whole of the land under the deed of gift. Under the Roman-Dutch law a gift by one spouse to the other is not absolutely void. Such a gift is valid if it is confirmed by the death of the donor without revoking the gift or otherwise dealing with the property (*Vanderlinden's Institutes 214; Voet, de donat. int. vir. et uxor, 24, 1, 14*).

Since the gift begins to operate so as to vest absolute title in the donee only on the death of the donor, it follows that the property donated then ceases to be property of the community, and no part of it falls into the estate of the deceased spouse. In this case Amanduwa predeceased Subi without revoking the gift and without disposing of the property, and therefore Subi became the owner of the whole land, and there was nothing for the children to inherit from Amanduwa.

It is contended in the next place that the plaintiffs have acquired the 1-12th share by prescription. The District Judge finds, and it is undoubtedly the fact, that Gavaria was all along in possession of the entire land, but it is said that by taking the deed of 1906 from Sima Veda, Gunaya, and Lapi he must be taken to have acknowledged that his possession previous to that deed was on behalf of the grantors and indirectly of Sima Veda's children the plaintiffs, and that therefore the plaintiffs prescribed for the 1-12th share through Gavaria himself. I am wholly unable to consent to this proposition. In my opinion the plaintiffs have no right either by inheritance or by prescription.

The title to the southern half would be still in Subi, unless Gavaria prescribed against Subi. This issue of possession was not before the Court, inasmuch as Subi, though she was next friend of the minor plaintiffs, was no party to the action. Subi's attitude in the case appears to be that she renounced her rights in favour of her children, and that being so, the only question on this appeal is whether the District Judge, though he is right in holding that the plaintiffs had no legal title, should not have made Subi a party plaintiff to the action and tried the issue of prescription as between her and the defendant. Subi, of course, cannot be made a party plaintiff against her will, but if she consents the course of proceeding suggested would be a convenient one, inasmuch as it would enable

the Court once for all to decide in this action all matters in dispute. With regard to this question of prescription on Gavaria's part, the District Judge incidentally remarked in his judgment that the deed of 1906 was an "acknowledgment of a right existing in another" in the sense of the Prescription Ordinance, and that therefore the defendant could not be said to have prescriptive title against Subi. I think this reading of the Ordinance is erroneous. The words I have quoted occur in the definition of possession "by a title adverse to and independent of the plaintiff," and clearly the acknowledgment must be of the right of a party to the action or of his predecessor in title. The acceptance of the deed of 1906 is an act of acknowledgment of the grantors' right, and, it may be, of any other person in the same title with them, but it is not an act from which an acknowledgment of any right in Subi can be inferred. On the contrary, it is the exact reverse, because the deed was granted on the footing that Subi had no title, but that the grantors were entitled by inheritance from Amanduwa.

I would make the following order. If Subi consents to be made a party plaintiff, the decree of dismissal of the action will be set aside, and an issue as to prescription against Subi will be tried and the action determined accordingly. If Subi is unwilling to be joined, the judgment appealed against will stand affirmed. In any event the plaintiffs should pay the defendant's costs in the District Court and in this Court.

Affirmed.